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CAPITAL ONE BANK and
8 CAPITAL ONE SERVICES, INC.

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 DAVID J. LEE, an individual and, on behalf
of others similarly situated,

14 Plaintiff,

15 v.

16 CAPITAL ONE BANK and CAPITAL
17 ONE SERVICES, INC., Virginia
corporations, DOES 1 through 100,
18 inclusive,

19 Defendants.

Case No. C07-4599 MHP

CLASS ACTION

**DEFENDANT CAPITAL ONE BANK'S
ANSWER TO COMPLAINT**

Hon. Judge Marilyn Hall Patel
Complaint filed: Sept. 5, 2007

1 Defendant Capital One Bank, by its attorneys, answers Plaintiff's Complaint
2 ("Complaint") as follows:

3 INTRODUCTION

4 1. Responding to paragraph 1 of the Complaint, Defendant states that the use in the
5 Complaint of the term "Capital One" to refer both to Capital One Bank and Capital One Services,
6 Inc. is improper, as the two entities, while related, do not engage in the same activities. This
7 Answer is provided on behalf of Capital One Bank only. Defendant states that insofar as
8 Plaintiff's averments in paragraph 1 state conclusions of law, no response thereto is required.
9 Except as expressly admitted, Defendant denies the averments contained in paragraph 1.

10 2. Responding to paragraph 2 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 2 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 2.

13 3. Responding to paragraph 3 of the Complaint, Defendant admits that its credit card
14 agreement contains an arbitration provision as quoted in paragraph 3 of the Complaint.
15 Defendant further states that the arbitration provision speaks for itself. Defendant states that
16 insofar as Plaintiff's averments in paragraph 3 state conclusions of law, no response thereto is
17 required. Except as expressly admitted, Defendant denies the averments contained in
18 paragraph 3.

19 4. Responding to paragraph 4 of the Complaint, Defendant states that insofar as
20 Plaintiff's averments in paragraph 4 state conclusions of law, no response thereto is required.
21 Except as expressly admitted, Defendant denies the averments contained in paragraph 4.

22 5. Responding to paragraph 5 of the Complaint, Defendant states that insofar as
23 Plaintiff's averments in paragraph 5 state conclusions of law, no response thereto is required.
24 Except as expressly admitted, Defendant denies the averments contained in paragraph 5.

25 THE PARTIES

26 6. Responding to paragraph 6 of the Complaint, Defendant is without knowledge or
27 information sufficient to form a belief as to the truth of the allegations contained in this paragraph
28

1 and on that basis denies the allegations. Except as expressly admitted, Defendant denies the
2 averments contained in paragraph 6.

3 7. Responding to paragraph 7 of the Complaint, Defendant states that insofar as
4 Plaintiff's averments in paragraph 7 state conclusions of law, no response thereto is required.
5 Except as expressly admitted, Defendant denies the averments contained in paragraph 7.

6 8. Responding to paragraph 8 of the Complaint, Defendant admits that Capital One
7 Bank issues credit cards. Defendant states that insofar as Plaintiff's averments in paragraph 8
8 state conclusions of law, no response thereto is required. Except as expressly admitted,
9 Defendant denies the averments contained in paragraph 8.

10 9. Responding to paragraph 9 of the Complaint, Defendant admits that it has issued
11 some of all of the cards identified in this paragraph and that it charges fees pursuant to an
12 agreement with its customers. Defendant states that insofar as Plaintiff's averments in
13 paragraph 9 state conclusions of law, no response thereto is required. Except as expressly
14 admitted, Defendant denies the averments contained in paragraph 9.

15 10. Responding to paragraph 10 of the Complaint, Defendant states that insofar as
16 Plaintiff's averments in paragraph 10 state conclusions of law, no response thereto is required.
17 Except as expressly admitted, Defendant denies the averments contained in paragraph 10.

18 11. Responding to paragraph 11 of the Complaint, Defendant states that insofar as
19 Plaintiff's averments in paragraph 11 state conclusions of law, no response thereto is required.
20 Except as expressly admitted, Defendant denies the averments contained in paragraph 11.

21 JURISDICTION

22 12. Responding to paragraph 12 of the Complaint, Defendant states that insofar as
23 Plaintiff's averments in paragraph 12 state conclusions of law, no response thereto is required.
24 Except as expressly admitted, Defendant denies the averments contained in paragraph 12.

25 13. Responding to paragraph 13 of the Complaint, Defendant admits that its credit
26 cards are advertised, promoted and used in this District. Defendant is without knowledge or
27 information sufficient to form a belief as to the truth of the allegation concerning Plaintiff's
28 residency. Defendant states that insofar as Plaintiff's averments in paragraph 13 state conclusions

1 of law, no response thereto is required. Except as expressly admitted, Defendant denies the
2 averments contained in paragraph 13.

3 THE FACTS

4 A. The Facts Concerning Capital One Credit Cards

5 14. Responding to paragraph 14 of the Complaint, Defendant admits that Capital One
6 Bank issues credit cards the terms of which are governed by written agreements. Except as
7 expressly admitted, Defendant denies the averments contained in paragraph 14.

8 15. Responding to paragraph 15 of the Complaint, Defendant states that insofar as
9 Plaintiff's averments in paragraph 13 state conclusions of law, no response thereto is required.
10 Except as expressly admitted, Defendant denies the averments contained in paragraph 15.

11 16. Responding to paragraph 16 of the Complaint, Defendant states that insofar as
12 Plaintiff's averments in paragraph 16 state conclusions of law, no response thereto is required.
13 Except as expressly admitted, Defendant denies the averments contained in paragraph 16.

14 17. Responding to paragraph 17 of the Complaint, Defendant admits that Capital One
15 Bank maintains records identifying credit card holders in the ordinary course of business. Except
16 as expressly admitted, Defendant denies the averments contained in paragraph 17.

17 18. Responding to paragraph 18 of the Complaint, Defendant admits that Capital One
18 Bank has a large number of customers throughout the United States, including California.
19 Defendant further admits that merchants typically pay a fee with respect to the use of credit cards.
20 Except as expressly admitted, Defendant denies the averments contained in paragraph 18.

21 19. Responding to paragraph 19 of the Complaint, Defendant admits that it has issued
22 some of all of the cards identified in this paragraph and that it charges fees pursuant to an
23 agreement with its customers. Except as expressly admitted, Defendant denies the averments
24 contained in paragraph 19.

25 B. Plaintiff's Facts

26 20. Responding to paragraph 20 of the Complaint, Defendant admits that Plaintiff
27 obtained a credit card in or about March 2007 and that he paid a fee. Defendant further admits
28 that Exhibits 8 and 9 appear to be the credit card agreement and arbitration agreement applicable

1 to plaintiff's account. Defendant states that insofar as Plaintiff's averments in paragraph 20 state
2 conclusions of law, no response thereto is required. Except as expressly admitted, Defendant
3 denies the averments contained in paragraph 20.

4 21. Responding to paragraph 21 of the Complaint, Defendant states that insofar as
5 Plaintiff's averments in paragraph 21 state conclusions of law, no response thereto is required.
6 Except as expressly admitted, Defendant denies the averments contained in paragraph 21.

7 22. Responding to paragraph 22 of the Complaint, Defendant states that insofar as
8 Plaintiff's averments in paragraph 22 state conclusions of law, no response thereto is required.
9 Except as expressly admitted, Defendant denies the averments contained in paragraph 22.

10 23. Responding to paragraph 23 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 23 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 23.

13 24. Responding to paragraph 24 of the Complaint, Defendant states that insofar as
14 Plaintiff's averments in paragraph 24 state conclusions of law, no response thereto is required.
15 Except as expressly admitted, Defendant denies the averments contained in paragraph 24.

16 25. Responding to paragraph 25 of the Complaint, Defendant states that insofar as
17 Plaintiff's averments in paragraph 25 state conclusions of law, no response thereto is required.
18 Except as expressly admitted, Defendant denies the averments contained in paragraph 25.

19 26. Responding to paragraph 26 of the Complaint, Defendant states that insofar as
20 Plaintiff's averments in paragraph 26 state conclusions of law, no response thereto is required.
21 Except as expressly admitted, Defendant denies the averments contained in paragraph 26.

22 27. Responding to paragraph 27 of the Complaint, Defendant states that insofar as
23 Plaintiff's averments in paragraph 27 state conclusions of law, no response thereto is required.
24 Except as expressly admitted, Defendant denies the averments contained in paragraph 27.

25 28. Responding to paragraph 28 of the Complaint, Defendant states that insofar as
26 Plaintiff's averments in paragraph 28 state conclusions of law, no response thereto is required.
27 Except as expressly admitted, Defendant denies the averments contained in paragraph 28.
28

1 29. Responding to paragraph 29 of the Complaint, Defendant states that insofar as
2 Plaintiff's averments in paragraph 29 state conclusions of law, no response thereto is required.
3 Except as expressly admitted, Defendant denies the averments contained in paragraph 29.

4 30. Responding to paragraph 30 of the Complaint, Defendant states that insofar as
5 Plaintiff's averments in paragraph 30 state conclusions of law, no response thereto is required.
6 Except as expressly admitted, Defendant denies the averments contained in paragraph 30.

7 31. Responding to paragraph 31 of the Complaint, Defendant states that insofar as
8 Plaintiff's averments in paragraph 31 state conclusions of law, no response thereto is required.
9 Except as expressly admitted, Defendant denies the averments contained in paragraph 31.

10 32. Responding to paragraph 32 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 32 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 32.

13 33. Responding to paragraph 33 of the Complaint, Defendant states that insofar as
14 Plaintiff's averments in paragraph 33 state conclusions of law, no response thereto is required.
15 Except as expressly admitted, Defendant denies the averments contained in paragraph 33.

16 34. Responding to paragraph 34 of the Complaint, Defendant states that insofar as
17 Plaintiff's averments in paragraph 34 state conclusions of law, no response thereto is required.
18 Except as expressly admitted, Defendant denies the averments contained in paragraph 34.

19 35. Responding to paragraph 35 of the Complaint, Defendant is without knowledge or
20 information sufficient to form a belief as to the truth of the allegations concerning Plaintiff's
21 willingness to invoke the arbitration provision, and on that basis denies the allegations in
22 paragraph 35. Defendant states that insofar as Plaintiff's averments in paragraph 35 state
23 conclusions of law, no response thereto is required.

24 36. Responding to paragraph 36 of the Complaint, Defendant states that insofar as
25 Plaintiff's averments in paragraph 36 state conclusions of law, no response thereto is required.
26 Except as expressly admitted, Defendant denies the averments contained in paragraph 36.

1 37. Responding to paragraph 37 of the Complaint, Defendant states that insofar as
2 Plaintiff's averments in paragraph 37 state conclusions of law, no response thereto is required.
3 Except as expressly admitted, Defendant denies the averments contained in paragraph 37.

4 38. Responding to paragraph 38 of the Complaint, Defendant states that insofar as
5 Plaintiff's averments in paragraph 38 state conclusions of law, no response thereto is required.
6 Except as expressly admitted, Defendant denies the averments contained in paragraph 38.

7 39. Responding to paragraph 39 of the Complaint, Defendant states that insofar as
8 Plaintiff's averments in paragraph 39 state conclusions of law, no response thereto is required.
9 Except as expressly admitted, Defendant denies the averments contained in paragraph 39.

10 40. Responding to paragraph 40 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 40 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 40.

13 41. Responding to paragraph 41 of the Complaint, Defendant states that the
14 agreements speak for themselves. Defendant states that insofar as Plaintiff's averments in
15 paragraph 41 state conclusions of law, no response thereto is required.

16 **C. The Capital One Customer Agreements**

17 42. Responding to paragraph 42 of the Complaint, Defendant admits that the
18 agreement identified as Exhibit 9 contains the language quoted in paragraph 42. Defendant
19 further states that the agreement speaks for itself. Except as expressly admitted, Defendant denies
20 the averments contained in paragraph 42.

21 43. Responding to paragraph 43 of the Complaint, Defendant admits that the
22 agreement identified as Exhibit 8 contains the language quoted in paragraph 43. Defendant
23 further states that the agreement speaks for itself. Except as expressly admitted, Defendant denies
24 the averments contained in paragraph 43.

VI. CAUSES OF ACTION

First Cause of Action
(Arbitration Provision-Violation of Bus. & Prof. Code 17200 et seq.
Due to Illegal Practice Under Civil Code § 1670.5
And The Common Law)

44. Responding to paragraph 44 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

45. Responding to paragraph 45 of the Complaint, Defendant states that Bus. & Prof. Code § 17200 speaks for itself.

46. Responding to paragraph 46 of the Complaint, Defendant states that Bus. & Prof. Code § 17203 speaks for itself.

47. Responding to paragraph 47 of the Complaint, Defendant states that Cal. Code of Civ. Proc. § 382 speaks for itself.

48. Responding to paragraph 48 of the Complaint, Defendant states that Cal. Civ. Code § 1670.5 speaks for itself. Defendant states that insofar as Plaintiff's averments in paragraph 48 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 48.

49. Responding to paragraph 49 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 49 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 49.

50. Responding to paragraph 50 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 50 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 50.

Second Cause of Action
(Arbitration Provision-Violation of Bus. & Prof. Code 17200 et seq.
Due to Illegal Practice Under Civil Code §§ 1668 and 3513)

51. Responding to paragraph 51 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

52. Responding to paragraph 52 of the Complaint, Defendant states that Civil Code § 1668 speaks for itself.

53. Responding to paragraph 53 of the Complaint, Defendant states that Civil Code § 3513 speaks for itself.

54. Responding to paragraph 54 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 54 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 54.

Third Cause of Action
(Arbitration Provision-Violation of Bus. & Prof. Code 17200 et seq.
Due to Illegal Practice Under Code of Civil Procedure § 1281.4)

55. Responding to paragraph 55 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

56. Responding to paragraph 56 of the Complaint, Defendant states that Code of Civil Procedure § 1281.4(a) speaks for itself.

57. Responding to paragraph 57 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 57 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 57.

Fourth Cause of Action
(Arbitration Provision-Violation of Bus. & Prof. Code 17200 et seq.
Due to Unfair Practice)

58. Responding to paragraph 58 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

59. Responding to paragraph 59 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 59 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 59.

60. Responding to paragraph 60 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 60 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 60.

Fifth Cause of Action
(Arbitration Provision-Violation of CLRA, Civil Code § 1770(a)(19))

61. Responding to paragraph 61 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

62. Responding to paragraph 62 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 62 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 62.

63. Responding to paragraph 63 of the Complaint, Defendant states that the letters attached to the Complaint as Exhibits 10 and 11 speak for themselves. Defendant states that insofar as Plaintiff's averments in paragraph 63 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 63.

64. Responding to paragraph 64 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 64 state conclusions of law, no response thereto is required. Defendant states that Civil Code § 1770(a) speaks for itself. Except as expressly admitted, Defendant denies the averments contained in paragraph 64.

65. Responding to paragraph 65 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 65 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 65.

Sixth Cause of Action
(Arbitration Provision-Violation of Bus. & Prof. Code § 17200 et seq. Due to Illegal Practice in Violation of Civil Code § 1770(a)(19))

66. Responding to paragraph 66 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

67. Responding to paragraph 67 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 67 state conclusions of law, no response thereto is required.

1 Defendant states that Civil Code § 1770(a) speaks for itself. Except as expressly admitted,
2 Defendant denies the averments contained in paragraph 67.

3 68. Responding to paragraph 68 of the Complaint, Defendant states that insofar as
4 Plaintiff's averments in paragraph 68 state conclusions of law, no response thereto is required.
5 Except as expressly admitted, Defendant denies the averments contained in paragraph 68.

6
7 **Seventh Cause of Action**
(Customer Agreement--Fraud and Deceit)

8 69. Responding to paragraph 69 of the Complaint, Defendant realleges and
9 incorporates by reference each and every preceding paragraph of this Answer as if fully set forth
10 herein.

11 70. Responding to paragraph 70 of the Complaint, Defendant states that the agreement
12 attached to the Complaint as Exhibit 7 speaks for itself. Defendant states that insofar as
13 Plaintiff's averments in paragraph 70 state conclusions of law, no response thereto is required.
14 Except as expressly admitted, Defendant denies the averments contained in paragraph 70.

15 71. Responding to paragraph 71 of the Complaint, Defendant states that insofar as
16 Plaintiff's averments in paragraph 71 state conclusions of law, no response thereto is required.
17 Except as expressly admitted, Defendant denies the averments contained in paragraph 71.

18 72. Responding to paragraph 72 of the Complaint, Defendant states that insofar as
19 Plaintiff's averments in paragraph 72 state conclusions of law, no response thereto is required.
20 Except as expressly admitted, Defendant denies the averments contained in paragraph 72.

21 73. Responding to paragraph 73 of the Complaint, Defendant states that insofar as
22 Plaintiff's averments in paragraph 73 state conclusions of law, no response thereto is required.
23 Except as expressly admitted, Defendant denies the averments contained in paragraph 73.

24
25 **Eighth Cause of Action**
(Customer Agreement--Violation of CLRA, Civil Code § 1770(a)(19))

26 74. Responding to paragraph 74 of the Complaint, Defendant realleges and
27 incorporates by reference each and every preceding paragraph of this Answer as if fully set forth
28 herein.

75. Responding to paragraph 75 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 75 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 75.

76. Responding to paragraph 76 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 76 state conclusions of law, no response thereto is required. Defendant states that Civil Code § 1770(a) speaks for itself. Except as expressly admitted, Defendant denies the averments contained in paragraph 76.

77. Responding to paragraph 77 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 77 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 77.

Ninth Cause of Action
(Customer Agreement--Violation of Bus. & Prof. Code § 17200 et seq.
Due to Illegal Practice Under Civil Code § 1670.5 And The Common Law)

78. Responding to paragraph 78 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

79. Responding to paragraph 79 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 79 state conclusions of law, no response thereto is required. Defendant states that Civil Code § 1670.5 speaks for itself. Except as expressly admitted, Defendant denies the averments contained in paragraph 79.

Tenth Cause of Action
(Customer Agreement--Violation of Bus. & Prof. Code § 17200 et seq.
Due to Unfair Practice)

80. Responding to paragraph 80 of the Complaint, Defendant realleges and incorporates by reference each and every preceding paragraph of this Answer as if fully set forth herein.

81. Responding to paragraph 81 of the Complaint, Defendant states that insofar as Plaintiff's averments in paragraph 81 state conclusions of law, no response thereto is required. Except as expressly admitted, Defendant denies the averments contained in paragraph 81.

1 82. Responding to paragraph 82 of the Complaint, Defendant states that insofar as
2 Plaintiff's averments in paragraph 82 state conclusions of law, no response thereto is required.
3 Except as expressly admitted, Defendant denies the averments contained in paragraph 82.

4
5 **Eleventh Cause of Action**
6 **(Declaratory Judgment)**

7 83. Responding to paragraph 83 of the Complaint, Defendant realleges and
8 incorporates by reference each and every preceding paragraph of this Answer as if fully set forth
9 herein.

10 84. Responding to paragraph 84 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 84 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 84.

13 85. Responding to paragraph 85 of the Complaint, Defendant states that insofar as
14 Plaintiff's averments in paragraph 85 state conclusions of law, no response thereto is required.
15 Except as expressly admitted, Defendant denies the averments contained in paragraph 84.

16 86. Responding to paragraph 86 of the Complaint, Defendant denies the averments
17 contained in paragraph 86.

18 **Class Allegations**

19 87. Responding to paragraph 87 of the Complaint, Defendant states that insofar as
20 Plaintiff's averments in paragraph 87 state conclusions of law, no response thereto is required.
21 Except as expressly admitted, Defendant denies the averments contained in paragraph 87.

22 88. Responding to paragraph 88 of the Complaint, Defendant states that insofar as
23 Plaintiff's averments in paragraph 88 state conclusions of law, no response thereto is required.
24 Except as expressly admitted, Defendant denies the averments contained in paragraph 88.

25 89. Responding to paragraph 89 of the Complaint, Defendant states that insofar as
26 Plaintiff's averments in paragraph 89 state conclusions of law, no response thereto is required.
27 Except as expressly admitted, Defendant denies the averments contained in paragraph 89.
28

1 90. Responding to paragraph 90 of the Complaint, Defendant states that insofar as
2 Plaintiff's averments in paragraph 90 state conclusions of law, no response thereto is required.
3 Except as expressly admitted, Defendant denies the averments contained in paragraph 90.

4 91. Responding to paragraph 91 of the Complaint, Defendant states that insofar as
5 Plaintiff's averments in paragraph 91 state conclusions of law, no response thereto is required.
6 Except as expressly admitted, Defendant denies the averments contained in paragraph 91.

7 92. Responding to paragraph 92 of the Complaint, Defendant states that insofar as
8 Plaintiff's averments in paragraph 92 state conclusions of law, no response thereto is required.
9 Except as expressly admitted, Defendant denies the averments contained in paragraph 92.

10 93. Responding to paragraph 93 of the Complaint, Defendant states that insofar as
11 Plaintiff's averments in paragraph 93 state conclusions of law, no response thereto is required.
12 Except as expressly admitted, Defendant denies the averments contained in paragraph 93.

13 94. Responding to paragraph 94 of the Complaint, Defendant states that insofar as
14 Plaintiff's averments in paragraph 94 state conclusions of law, no response thereto is required.
15 Except as expressly admitted, Defendant denies the averments contained in paragraph 94.

16 95. Responding to paragraph 95 of the Complaint, Defendant states that insofar as
17 Plaintiff's averments in paragraph 95 state conclusions of law, no response thereto is required.
18 Except as expressly admitted, Defendant denies the averments contained in paragraph 95.

19 96. Responding to paragraph 96 of the Complaint, Defendant states that insofar as
20 Plaintiff's averments in paragraph 96 state conclusions of law, no response thereto is required.
21 Except as expressly admitted, Defendant denies the averments contained in paragraph 96.

22 97. Responding to paragraph 97 of the Complaint, Defendant states that insofar as
23 Plaintiff's averments in paragraph 97 state conclusions of law, no response thereto is required.
24 Except as expressly admitted, Defendant denies the averments contained in paragraph 97.

25 98. Responding to paragraph 98 of the Complaint, Defendant states that insofar as
26 Plaintiff's averments in paragraph 98 state conclusions of law, no response thereto is required.
27 Except as expressly admitted, Defendant denies the averments contained in paragraph 98.
28

1 99. Responding to paragraph 99 of the Complaint, Defendant states that insofar as
2 Plaintiff's averments in paragraph 99 state conclusions of law, no response thereto is required.
3 Except as expressly admitted, Defendant denies the averments contained in paragraph 99.

4 Except as expressly admitted, Defendant denies all averments in the Complaint.

5 **AFFIRMATIVE DEFENSES**

6 Without admitting any of the allegations of the Complaint and without admitting or
7 acknowledging that Defendant bears any burden of proof as to any of them, Defendant asserts the
8 following affirmative defenses. Defendant intends to rely upon any additional defenses that
9 become available or apparent during pretrial proceedings and discovery in this action and hereby
10 reserves the right to amend this Answer in order to assert all such further defenses.

11 **FIRST AFFIRMATIVE DEFENSE**
12 **(Failure to State a Claim)**

13 The Complaint, and each of its purported causes of action, is barred for failure to state a
14 claim upon which relief can be granted.

15 **SECOND AFFIRMATIVE DEFENSE**
16 **(Conformity with Standards)**

17 The Complaint, and each of the purported causes of action, is barred, in whole or in part,
18 because Defendant's statements, conduct and actions were in conformity with and were made
19 pursuant to statutes, governmental regulations, and industry standards existing at the time of such
20 statements, conduct and actions.

21 **THIRD AFFIRMATIVE DEFENSE**
22 **(Statute of Limitations)**

23 The Complaint, and each of the purported causes of action, is barred in whole or in part by
24 the applicable statute of limitations.

25 **FOURTH AFFIRMATIVE DEFENSE**
26 **(Arbitration)**

27 The Complaint, and each of the purported causes of action, may be barred in whole or in
28 part by Plaintiff's agreement to resolve these disputes through arbitration.

1 **FIFTH AFFIRMATIVE DEFENSE**
2 **(Accord and Satisfaction, Waiver, Estoppel, Res Judicata, and/or Release)**

3 The Complaint, and each of the purported causes of action, is barred in whole or in part by
4 the doctrines of accord and satisfaction, waiver, estoppel, *res judicata*, and/or release.

5 **SIXTH AFFIRMATIVE DEFENSE**
6 **(Judicial Estoppel)**

7 The Complaint, and each of the purported causes of action, is barred in whole or in part by
8 the doctrine of judicial estoppel.

9 **SEVENTH AFFIRMATIVE DEFENSE**
10 **(Unclean Hands)**

11 The Complaint, and each of its purported causes of action, is barred, in whole or in part,
12 by the doctrine of unclean hands.

13 **EIGHTH AFFIRMATIVE DEFENSE**
14 **(Set Off)**

15 To the extent that Plaintiff and any putative class member have outstanding obligations to
16 Defendant, their claims are barred or reduced.

17 **NINTH AFFIRMATIVE DEFENSE**
18 **(Preemption)**

19 The Complaint, and each of its purported causes of action, is barred, in whole or in part,
20 by the doctrine of preemption.

21 **TENTH AFFIRMATIVE DEFENSE**
22 **(Due Process)**

23 Plaintiff's claim for punitive damages is barred, in whole or in part, by the Due Process
24 Clause of the United States Constitution.

25 **ELEVENTH AFFIRMATIVE DEFENSE**
26 **(Claims of Putative Class Members Barred)**

27 The claims of the putative class members are barred by some or all of the defenses that bar
28 Plaintiff's claims.

PRAYER

WHEREFORE, Defendant prays as follows:

1. That Plaintiff takes nothing by reason of his Complaint, that judgment be rendered in favor of Defendant;
2. That Defendant be awarded its costs of suit incurred in defense of this action; and
3. For such other relief as the Court deems proper.

Dated: October 25, 2007

MORRISON & FOERSTER LLP

By: /s/ James McGuire
James McGuire

Attorneys for Defendants
CAPITAL ONE BANK and
CAPITAL ONE SERVICES, INC.